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FEDERAL COMMUNICATIONS COMMISSION
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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of Section 309(j) of the Communications Act -- Competitive Bidding for Commercial Broadcast and Instructional Television Fixed Service Licenses	)	MM Docket No. 97-234
	)	
Reexamination of the Policy Statement on Comparative Broadcast Hearings	)	GC Docket No. 92-52
	)	
Proposals to Reform the Commission's Comparative Hearing Process to Expedite the Resolution of Cases	)	GEN Docket No. 90-264

To: The Commission

COMMENTS
OF
THROCKMORTON BROADCASTING, INC.

Comes now **Throckmorton Broadcasting, Inc.** ("Throckmorton"), by Counsel, and pursuant to the *Notice of Proposed Rule Making ("NPRM"), FCC 97-397 (released November 26, 1997)* hereby submits these Comments in the above-captioned rule making proceeding. In support hereof, Throckmorton submits the following:

Background

1. Throckmorton is an applicant for a new commercial FM broadcast station on Channel 240A at Macomb, Illinois (FCC File No. BPH-961017ME).

2. As will be explained below, Throckmorton is shocked and dismayed over many of the Commission's proposals in the NPRM. It is

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apparent that, in the Commission's and Congress' zeal to raise money, it has devised a new system of broadcast licensing that unequivocally favors wealthy, deep-pocketed persons or entities, and substantially prejudices small businesses and minorities. Throckmorton wonders where the longstanding goal of "public interest, convenience and necessity" has gone./[1] Likewise, where has the importance of "diversification of media control" gone? In its place the Commission proposes a trickle-down, "money talks" policy. The proposal is so inherently unfair -- and so illogically conceived -- that one has to wonder if the Commission now believes that its delegated authority provides it power to disregard due process and the U.S. Constitution in general.

3. In Paragraph 18 of the NPRM, the Commission seeks comments on the question as to whether competitive bidding has been established as the congressionally preferred method of awarding spectrum licenses where mutually exclusive applications are on file. Although it is clear that Congress wants the FCC to utilize the competitive bidding selection process for mutually exclusive applications filed on or after July 1, 1997, the Commission must nonetheless consider and respect other Congressional mandates that still remain in the Communications Act --- namely, §309(j)(3)(A) of the Communications Act (whereby the Commission must determine that use of a system of competitive bidding will promote the development and rapid deployment of new technologies, products, and services for the *benefit of the public ..... without administrative or judicial delay)*. In its haste to institute competitive bidding, the Commission has failed to reconcile many of the auction proposals enunciated

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[1] See, §§307(a) and 309(a) of the Communications Act of 1934, as amended.

in the NPRM with the requirements of §309(j)(7) of the Communications Act.

4. Many of the proposals in the NPRM violate the most basic principles of due process, and thereby stand as an open invitation for appellate litigation. Therefore, finality of the NPRM will be anything but rapid. Throckmorton urges the Commission not to rush to judgment in implementing any type of auction procedures. Nearly forty years of evolving and thoughtful regulation cannot simply be replaced in a workable manner if the overriding goal is to quickly raise money and worry about the problems later. Has the Commission not learned its lesson from other failed auction procedures, such as IVDS? Several times in the NPRM the Commission admits that its proposals might result in harsh results. The term "harsh results" simply means more appeals, more litigation, more delays, and overall deadlock.

5. The Commission must be reminded that is not permitted to base a finding of public interest, convenience, and necessity on the expectation of Federal revenues that would result from the use of competitive bidding. *See, §309(j)(7) of the Communications Act. While t*he legislative directives are clear and precise, the Commission's interpretations thereof are anything but clear and precise. In other words, Throckmorton believes that the Commission's proposals totally ignore its public interest obligations solely for the sake of raising revenue and, therefore, violate the Communications Act.

Comments on Specific FCC Proposals

6. In Paragraph 14 of the NPRM, the Commission concludes that applicants such as Throckmorton have no vested right in a comparative hearing process, and that if the rules were changed and retroactively applied to Throckmorton, there would be no violation of due process. The Commission's

logic is not supported by case law. In *Yakima Valley Cablevision, Inc. v. FCC, 60 RR 2d 1188 (U.S. App. D.C. 1986),* the Court noted that the decision whether to make a new policy prospective or retroactive is "an important aspect of the problem" that must be considered by an agency changing a longstanding policy. "Indeed, courts have long hesitated to permit retroactive rule making and have noted its troubling nature. When parties rely on admittedly lawful regulation and plan their activities accordingly, retroactive modification or recision of the regulation can cause great mischief. Of course, an agency must balance this mischief against the salutary effects, if any, of retroactivity. Reviewing courts, in turn, must critically examine retroactive rule making to ensure that the agency has appropriately balanced the competing considerations." *Id., at 1196 (citations and footnotes omitted; emphasis added).*

7. The dangers of retroactive rule making noted in *Yakima Cablevision* are clearly recognized in Paragraph 20 of the NPRM, where the Commission flippantly dismisses the possibility of adopting new comparative criteria because "none ... is sufficiently well-developed in the current record to warrant adoption at this time." Such reasoning is pathetically shallow. First of all, there is no reason why the record could not be developed at this time so that the Commission "has appropriately balanced the competing considerations." Second, the Chairman's Office previously indicated that new criteria could be adopted. Unfortunately such efforts were shelved under the pressure of Congressional oversight. The Commission cannot blame the lack of a record when no real efforts were ever expended to develop such a record.

8. In Paragraph 17 of the NPRM, where the Commission concludes

that auctions will likely lead to a more speedy resolution of pending cases. Even if this were to be true, the Commission should not disregard the importance of diversification of media. Money should not be the most important factor. Since the auction process favors the most deep-pocketed bidders, there is a real danger that the auction process will cause the wealthy to dominate the broadcast world. Diversification of the media should always be a long term goal so that small businesses and minorities maintain an active voice. While are large regional or national company might have the financial wherewithal to build a new broadcast station quickly, that entity might not be as responsive to the local interests and needs as a local small business or minority applicant. Money cannot buy "localism" or "responsiveness."

9. Beginning in Paragraph 30 of the NPRM, the Commission proposes to accept short-form applications as the sole documentation necessary to qualify for participation in an auction. However, such a simple process will simply invite too many speculators, many of which will have ulterior motives to participate in an auction./[2] There should be some level of commitment necessary to weed out the insincere applicants from the sincere ones. If an applicant is required to obtain a transmitter site, prepare a preliminary engineering statement, demonstrate financial qualifications, and take other preliminary steps as the "price of admission" to participate, the field of bidders

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[2] In the recent past, existing broadcasters often spent large sums of money prosecuting a new station application simply to keep new competition off the air. In certain instances, an applicant would obtain a Construction Permit, never construct, and then surrender the permit to the Commission -- solely to keep a new voice from entering the market. Persons with deep-pockets will be able to play these games more often in an auction process where little commitment is needed to participate.

would be reasonably narrowed. If the Commission is truly concerned with preserving any semblance of small business and minority ownership, then it cannot adopt a procedure that makes its too easy for the wealthy simply to throw their money around for the sake of grabbing as many broadcast properties as it can buy. If the Commission makes it too easy for anyone to participate in any given auction, the wealthiest applicants will go on a buying spree to the detriment of small businesses and minorities./[3]

10. In Paragraphs 37 and 38 of the NPRM, the Commission proposes not to accept any petition to deny against a pending applicant prior to the auction, and questions whether any special penalties should be assessed against disqualified or defaulted bidders. First, the failure to accept pre-auction petitions is a bad idea. Applicants who should not qualify, or who have ulterior motives, should not be able to participate in the auction otherwise they will poison the auction. For example, if Throckmorton were to know that one of the competing applicants for Macomb, Illinois has falsely certified the availability of its transmitting site, this fact, when brought to the Commission's attention, should disqualify the applicant from the auction. Also, if an applicant could not own the broadcast station due to multiple ownership considerations but nevertheless participates in the auction to drive the price up so his competition's start-up costs increase, thus has the power to stifle competition by creating more debt for the competition as the result of the false bidding. In IVDS we learned that certain parties conspired to drive prices upwards in

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[3] Even if the Commission awards bidding credits to small businesses and minorities, the wealthiest bidders will still out bid the less fortunate bidders to the extent necessary to overcome the bidding credit. Auctions will not work to promote diversity of ownership.

certain markets to create a false sense of valuation for other nearby markets that they had similar businesses or permits for.

11. The Commission might be able to take a que from the private auction process that many applicants and law firms utilized to settle pre-July 1, 1997 cases prior to the statutory February 1, 1997 deadline. The Commission could require a very large deposit (such as $100,000 or $200,000) along with the filing of the auction qualification documents. This deposit would be lost if the applicant failed to meet its auction commitment. In addition, such a default could also trigger the surrender of other FCC permits or licenses as a penalty.

12. In order to facilitate the rapid deployment of new broadcast services under the new rules now being contemplated, the FCC must include a pre-auction acceptability review of all applications. For example, with AM applications in particular, if someone proposed a frequency that absolutely could not work at a particular location -- or could work but required a myriad of special considerations or waivers -- the FCC should not hold the auction until such acceptability matters are resolved./[4]

13. There is another problem with the petition to deny process that is proposed in Paragraph 37 -- without the opportunity to have at least limited cross-examination testimony an applicant will escape true scrutiny by hiding behind creative lawyering. If the Commission simplifies its processes too much, it will not only abdicate its responsibilities under the Communications Act but

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[4] The Commission should never forget that the relaxed filing requirements for Low Power Television applications in the mid-1980's resulted in the filing of thousands of defective and non-grantable applications. Without some kind of pre-auction acceptability review, the LPTV nightmare will return.

also make a sham of its selection process.

14. In Paragraphs 39 and 40 of the NPRM, the Commission proposes to subject secondary service applicants to the auction process. Throckmorton questions how any service can remain secondary -- and subject to subsequent condemnation by the Commission -- once a permittee or licensee pays his money. If the Commission takes back the license, would such a licensee be entitled to a refund of the fee paid at auction, as well as reimbursement for construction and related costs? Simply stated, if a permittee or licensee is forced to participate in an auction, the service can no longer be secondary in nature.

15. In Paragraph 42 the Commission seeks comments on whether filing windows that have already opened and closed should be re-opened to permit new participants. This is probably the most controversial aspect of the NPRM. The Commission should not re-open any of these windows. Applicants, such as Throckmorton in Macomb, expended a lot of time and money to prepare and file an application within the time frame previously mandated by the Commission. Throckmorton's applications were prepared in response to a specific Commission "Report and Order," which did not indicate there would be any opportunity in the future to apply for the broadcast channel beyond the specific filing window dates. Throckmorton reasonably relied on the terms of each "Report and Order," and any change now to those terms would be nothing more than a "bait and switch" tactic by the Commission.

16. It would be a flagrant violation of due process to now disregard a previously announced deadline and require new entrants, especially since new entrants would only be required to file a short-form application. As noted

above, the Commission must be reminded that is not permitted to base a finding of public interest, convenience, and necessity on the expectation of Federal revenues that would result from the use of competitive bidding. *See, §309(j)(7) of the Communications Act.* The potential revenue that might ensue from broadening the bidding pool in these instances does not outweigh the injustice that would occur if due process and previous FCC directives were now disregarded. And, this would never pass the Supreme Court's due process test, as set forth in *U.S. v. State Farm Mutual Automobile Insurance Co., 463 U.S. 29 (1983).*[5]

17. The Commission's proposals in Paragraphs 47 and 48 of the NPRM, whereby applicants for modified facilities would be subject to an auction, will have a serious "chilling effect" on the industry. A broadcaster must have the ability and flexibility to reasonably change its services in response to demographic changes or public interest considerations. If population shifts over a period of time require a broadcaster to change its signal to maintain service, there should be no penalty for trying to do this. What about broadcasters that lose their transmitting sites? Should they be subject to an auction because they must seek a new site? No! The Commission currently has in place a fair method for resolving mutually exclusive applications. The Commission cannot look at revenue-generating methodology

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[5] In the NPRM at footnote 11, the Commission cites to *DIRECTV v. FCC, 7 CR 758 (D.C. Cir. 1997)* for the proposition that the Commission may change its rules (i.e., re-opening previous filing windows) without violating due process. The Commission's reliance on *DIRECTV* is misplaced because in that instance the Court specifically noted that "the Commission did not reopen a previously closed processing round .." *Id., 7 CR 758 at 766.*

for every regulatory step it needs to take. If the Commission does, then broadcasters will never try to improve service, try to resuscitate a failing station, or bring a silent station back on-air.

18. With respect to 47 U.S.C. §307(b), as noted in Paragraph 49, Throckmorton believes that special procedures -- but not auctions -- should address these matters. These matters, like license modification applications, cannot be solved by money considerations.

19. In Paragraph 57 of the NPRM, the Commission proposes to establish minimum opening bids. Any attempt to do this is arbitrary at best. Minimal prices of something that was previously free serves to scare off true small business and minority applicants.

20. In Paragraph 68 of the NPRM comments are invited with respect to whether pre-auction engineering statements should be submitted. Throckmorton supports this proposal. As noted earlier in these Comments, such a submission would weed out the insincere bidders from the sincere bidders, and also provide the Commission with a vehicle to avoid post-auction engineering delays that could otherwise have been avoided./[6]

21. In Paragraph 72 of the NPRM the Commission seeks comments with respect to the treatment of applications for modified facilities. Throckmorton supports the notion that modification applications should be

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[6] In most instances, a serious bidder will have conducted an engineering study prior to the auction to determine the service area and service population of the allocation, so at to make a determination of the value of the opportunity. And, since transmitter sites are often difficult to secure, a serious bidder would want to have the comfort of having all these matters resolved prior to the auction, so that no snags develop later that could cause a default or surrender of the Construction Permit.

permitted anytime. In the event such an application becomes mutually exclusive with another applicant's modification proposal, the Commission should send a letter to the mutually exclusive applicants, and afford them an opportunity to resolve the mutual exclusivity through a negotiated settlement, including further technical amendments, the dismissal of one or more applications, and the payment of consideration -- or any combination thereof. However, in the event the parties cannot voluntarily resolve these matters, the Commission should do so without competitive bidding. If these kinds of applications would be subject to auctions, then -- once again -- on the wealthy could thrive, prosper and grow in the broadcast industry. The Commission cannot let revenue raising dictate every aspect of broadcast regulation, otherwise more wealthy competitors would be encouraged to file insincere strike applications solely for the sake of slowing down or stifling the competition.

22. The proposed Anti-Collusion Rules in Paragraph 73 should include a mechanism for mutually-exclusive applicants to discuss settlement prior to the auction at least in situations where more than one application could be granted if certain amendments are filed to one or more pending applications. Although the avoidance of an auction might deprive the Commission from raising revenue, there should be greater public interest in instituting new service to more than one community as compared to raising revenue through an auction.

23. In Paragraph 81 of the NPRM, the Commission proposes to eliminate pre-auction transmitter site "reasonable assurance" requirements that now exist in the application process. As noted above in Paragraph 9, Throckmorton objects to this proposal.

24. With respect to the Minority Eligibility Standards addressed in Paragraph 88, Throckmorton encourages the use of bidding credits or other tools as a means of enhancing minority participation, but there must be some means to ensure that a minority bidder is substantially minority in composition, and not just a nominal "front" for an otherwise unqualified, un-minority bidder. The same logic should apply to the female ownership considerations noted in Paragraph 91 -- an entity entitled to a bidding credit because of female ownership should be substantially (at least 90%) female owned.

25. With respect to the Diversification of Ownership considerations noted in Paragraph 92, Throckmorton urges the Commission to adopt a well-reasoned policy to promote and maintain media diversification. The recent consolidation in the radio industry is a death-knell to small business, minority and female ownership in radio broadcasting. The deep-pocketed companies in the radio industry are spreading their wings like prehistoric condors. In market after market, the independent broadcasters that are left are at a competitive and marketing disadvantage. Employees are being laid off as Main Studios consolidate -- and it usually the minority employees that are the first to be laid off. If more careful consideration is not taken, broadcasting will soon become an industry of the elite.

26. Finally, with respect to the ITFS services noted in Paragraph 98, these should never be auctioned off. Spectrum specifically reserved for educational use should never be subject to an auction.

Conclusion

WHEREFORE, the above premises considered, Throckmorton encourages the Commission to adopt the suggestions noted herein to ensure a more fair

and equitable regulatory atmosphere.

Respectfully submitted,

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